(19) (18)

Nos. 91-261 and 91-274

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT,
Petitioner

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et al.*

MASSACHUSETTS WATER RESOURCES AUTHORITY and KAISER ENGINEERS, INC.,
Petitioners

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et al.*

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Of Counsel:
STEPHEN A. BOKAT
ROBIN S. CONRAD
MONA C. ZEIBERG
NATIONAL CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

ROSEMARY M. COLLYER
CLIFTON S. ELGARTEN *
ELLEN B. MORAN
CROWELL & MORING
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595
(202) 624-2500
* *Counsel of Record for Amicus Curiae*

September 8, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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INTEREST OF THE *AMICUS CURIAE* [1]

The Chamber of Commerce of the United States of America ("the Chamber") is a federation consisting of approximately 200,000 companies and several thousand other organizations such as state and local chambers of commerce and trade and professional associations. It is the largest association of business and professional organizations in the United States. A significant aspect of the Chamber's activities involves the representation of the interests of its member-employers in employment and labor relations matters before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing briefs *amicus curiae* in a wide spectrum of labor relations litigation before the Court.[2]

This case presents the issue whether a State may prescribe the terms of private labor relations and agreements whenever it invokes its interest as a purchaser of goods or services. Through the simple expedient of labeling all state purchases as "proprietary" actions, Petitioners Massachusetts Water Resources Authority ("MWRA"), Kaiser Engineers, Inc. ("Kaiser"), and the Building and Construction Trades Council ("Union") seek to avoid controlling precedent which has consistently held that the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (1988) (the "Act" or "NLRA"), preempts government interference with the representation and collective bargaining processes governed by the Act.[3] In reaching its decision, the Court should reject Petitioners' argument that a State as a purchaser of goods and services, *i.e.*, a "market participant", is generally free from NLRA preemption. The court below properly applied long-standing principles of law and its decision should be sustained.

[1] This brief is filed with the written consent of all parties as provided in Rule 37.3 of the Rules of the Supreme Court of the United States. Copies of those consents are on file with the Clerk of the Court.

[2] *E.g., Gade, Director, Illinois Environmental Protection Agency v. National Solid Wastes Management Association*, No. 90-1676 (U.S. June 18, 1992); *The District of Columbia v. Greater Washington Board of Trade*, No. 91-1326 (U.S., filed July 8, 1992); *Lechmere v. NLRB*, 112 S. Ct. 841 (1992).

Because of certain pending litigation, the Chamber has an immediate concern for the continued vitality and force of this Court's precedents that establish the freedom of the private sector collective bargaining process from governmental interference. The Chamber is the appellee in a case pending before the Ninth Circuit Court of Appeals in which the district court held that the NLRA preempted a county ordinance which purported to require the payment of union-negotiated wage and benefit rates by wholly private employers in the construction industry. *Associated Builders & Contractors v. Baca*, 769 F. Supp. 1537 (N.D. Cal. 1991).[4] The district court properly found such direct intervention by the county into the collective bargaining process to be preempted by federal

[3] *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959) (*"Garmon"*); *Local 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976) (*"Machinists"*); *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986) (*"Golden State I"*); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989).

[4] At issue in *Baca* is a county ordinance entitled "Prevailing Wages for Industrial Construction" ("Ordinance"), adopted on August 21, 1990. *Baca*, 769 F. Supp. at 1540. The Ordinance directed private employers to pay "not less than the per diem wage" to "all construction workers" on private construction projects worth more than $500,000.00 in unincorporated areas of Contra Costa County. Ord. § 526-2.802. *Id.* By state law, these mandated wage and benefit amounts are set by reference to union-negotiated wage and benefit rates. *Id.* at 1545.

law, and therefore unlawful. *Id.*[5] Although the instant case arises in a somewhat different context,[6] the principle which the district court in *Baca* applied from this Court's cases would be seriously eroded if the judgment below is overturned on the theory advanced by Petitioners.

On the face of things, it is difficult to see why a State's purchasing interest is different in kind from any number of other sovereign interests in providing services to its citizens that a State might advance to support its selective usurpation of the collective bargaining process. Whatever the merit of Petitioners' argument that the State is entitled to special prerogatives where it can invoke the market participant rationale, it is plain that the scope of state and municipal purchases of goods and services is sufficiently pervasive that, if accepted, this rationale would result in a major segment of labor relations being withdrawn from the exclusive governance of the Act.

Therefore, the Chamber files this brief in support of Respondent in order to assist the Court in its consideration of the issues in the case.

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[5] The district court invalidated the county Ordinance on three grounds: preemption by the NLRA because of its direct intrusion into and regulation of the collective bargaining process (*Baca*, 769 F. Supp. at 1545); preemption by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (1988) ("ERISA") because of its reference to and connection with ERISA-covered plans (*Baca*, 769 F. Supp. at 1547); and violation of the Contract Clause because the Ordinance would have abrogated existing collective bargaining agreements which did not meet its mandated wage and benefit terms. (*Id.* at 1547).

[6] The Ordinance in *Baca* was not limited to situations in which a state or local government was necessarily the beneficiary of the particular goods or services being generated.

COUNTER-STATEMENT OF THE CASE

The basic facts are set out in the opinion of the court below and will not be rehearsed at length in this brief. Petitioners have, however, with rhetorical flourish, placed inordinate emphasis on certain issues and facts which *amicus* believes to be largely beside the point. Thus, Petitioners' conception of the case and of the issues presented requires some response to place the relatively straightforward legal principles which ought to govern this case into clear focus.

Specifically, *Petitioners* seek to emphasize:

1. *That the project for which the State here sought to mandate a particular bargaining relationship, and the full scope of the terms and conditions of employment, was initiated as a result of a federal court order and a federal deadline, imposed as a consequence of the State's earlier failures to comply with federal law.* Pet. Br. 3, 6, 25-26. Although these background facts are apparently highlighted to demonstrate a significant State interest in the timely completion of the Boston Harbor project, *amicus* is willing to assume that important state interests can be said to underlie virtually any state project or purchase, including this one. No substantive argument is made why the general benefits of this project should affect the Court's analysis of preemption questions.

2. *The size, duration and "magnitude" of the project.* Pet. Br. 4-6, 25-26. Petitioners apparently emphasize the scope of the project to establish the State's interest in this particular project and in maintaining its vision of stable and satisfactory labor relations. But the size of this project only serves to emphasize the practical effects of state contracting decisions on what are indisputably *private* firms marketing privately produced goods and services. Purchases by state and local governments from the private market are a significant feature of our economy. Any right granted to state government to im-

pose a particular labor relations framework on that market would cut a broad swathe through the NLRA. The question is not whether the Boston Harbor clean-up project is important to the State; presumptively, it is. Rather, the issue is whether the importance of the project gives the State license to emasculate federal rights under the NLRA.

3. *That the State decided to impose the regime of labor relations in this case on the basis of advice received from a private firm, here, Kaiser Engineers.* Pet. Br. 6.[7] *Amicus* is willing to assume that any time a state or local government may decide to intervene in private labor relations, such intervention would be the product of considered expert advice, or perhaps the weighing of competing advice from different sources. Nonetheless, *amicus* does not consider it appropriate to base a *preemption* analysis on the fact that the State was advised in any particular case to take the position it did, or who provided the advice and for what reason. Contrary to Petitioners' model, preemption analysis turns on whether a State has impermissibly interfered with federally protected rights, not *who* recommend that it do so. Quite properly, "State officials . . . regulate in accordance with the views of the local electorate," not to further federal interests. *New York v. United States*, 112 S.Ct. 2408, 2424 (1992). The record in this particular case may not directly demonstrate the interplay of *political* forces and pressures which led to the initial negotiation of the

[7] The United States takes comfort in arguing throughout its brief that "[i]ndeed, the project labor agreement at issue here actually was negotiated and entered into by Kaiser Engineers, the private construction manager that MWRA selected." Br. for U.S. at 19. More realistically, Petitioners concede that "economic forces" "caused *MWRA and the* [*Union* to] each balance[] costs and benefits to reach an outcome both consider economically beneficial. . . . [T]he Agreement provides [MWRA] with legally enforceable assurances." Pet. Br. 25 (emphasis added). *See also* Memorandum to James F. Snow, Jt. App. at 92-93.

Labor Agreement. But it is inevitable in our democracy that if the Court declares this field open to state intervention, both labor and management will avail themselves of the political process and lobby state officials concerning labor arrangements to be imposed on construction projects, and in other fields in which state and local governments act as purchasers. In each such case, private labor relations will be held hostage to the political powers of persons and organizations with no direct relationship to those at the bargaining table. *See Golden State I*, 475 U.S. at 610-11.

4. *That the particular set of requirements and the special labor-management relationship which the State here imposed is a form of labor relationship that would not violate the Act if arrived at by private parties.* Pet. Br. 18, 24-26. The issue here is not whether these arrangements would be lawful if agreed upon by private parties in the construction industry; the issue is whether the State has the power to impose these arrangements on private parties. While it is true that the particular form of labor relationship at issue may be *permissible* under the Act, it is not *required* by the Act. It is permitted only when it is arrived at voluntarily by private parties in the exercise of other rights and obligations under the Act. The State can no more insist that private parties adhere to that particular relationship than prohibit the parties from adopting it.

5. *That the State is exempted from the NLRA.* Pet. Br. 27-30. The fact that the NLRA does not purport to regulate States *as employers* under the Act demonstrates congressional sensitivity to traditional notions of federalism. Under the constitutional scheme, the federal government does not normally regulate the States. On the other hand, as respects prescriptions and proscriptions on the actions of *private parties*, federal law is supreme and frequently bars the States from intervening to affect those actions as a simple matter of basic preemption.

6. *The fact that the State here has a "proprietary" interest as a market participant.* Pet. Br. 18-19. Although the State here happens to be acting as a purchaser of construction services, its potential interest as a "market participant" is pervasive. Many, if not most, state activities rely, at least to some extent, on contracting for goods and services provided by private industry. Petitioners do not distinguish between purchasing construction services for the Boston Harbor project and engineering and building services for roads. Nor does their argument admit a distinction between construction services, on the one hand, and the procurement of computers or computer services to operate the State's welfare program or tax collection mechanism, on the other. Moreover, it is difficult to see why a state's purchasing interests should be deemed paramount to other sovereign interests of the State in maintaining the public welfare. The State as a market participant is free to insist on its legitimate contractual rights as the purchaser of goods and services—to insist that the persons and entities with which it does business live up to their obligations. Such rights are far removed from the authority asserted here, under the guise of a purchasing decision, to interfere directly with private labor representational matters and collective bargaining.

SUMMARY OF ARGUMENT

The National Labor Relations Act establishes the federal government, through the National Labor Relations Board ("NLRB" or "Board"), as the only governmental arbiter of private labor relations and collective bargaining relationships in this country. On matters of collective bargaining and employee representation, the Board alone has authority over private employees and employers. The Act reflects a basic federal policy which intentionally leaves the outcome of the collective bargaining process to the free play of economic forces. That policy is antithetical to governmental prescription of the outcome of the bargaining relationship, or to governmental effort to

tip the balance in favor of one side or the other in that relationship.

Petitioners and the United States as *amicus curiae* argue that because the MWRA, a State agency, was acting in "a proprietary capacity—as a market participant," U.S. Br. 18, it "should have if anything, more freedom than private parties in matters affecting labor relations, not less." Pet. Br. 19.[8] Petitioners are clearly wrong. Free collective bargaining—without government intervention and affected only by the potential use of economic weapons—lies at the heart of the rights protected by the NLRA. Whenever government places a hand on the balance scale between negotiating parties—whether by setting the contours within which the parties may bargain, limiting the availability of economic weaponry, or by pre-determining the results of that bargaining—it impedes the process Congress intended to leave wholly unregulated. Just as clearly, States have no business imposing collective bargaining representatives on private employees. The NLRA affords private employees—not state governments—the right to select "representatives of their own choosing." 29 U.S.C. § 157 (1988).

In this case, the State has imposed as pervasive a scheme of labor relations as one could imagine on those who would seek to compete for state contracts and participate in state projects. Bid Specification 13.1 specifies that *no* contractor may obtain work at the MWRA Boston Harbor project unless and until, "as a condition of being awarded a contract or subcontract," he or she agrees "to abide by the provisions of the Boston Harbor Wastewater Treatment Facilities Project Labor Agree-

[8] Petitioners' argument that federal labor preemption applies only to "the narrow band of situations in which the state consciously seeks to deprive either an employer or its union of weapons in an existing labor dispute" is just wrong. Pet. for Cert. 16. This stingy reading of NLRA preemption was advanced by the Ninth Circuit in *Golden State* and specifically rejected by the Court. *Golden State I*, 475 U.S. at 612, 619.

ment." *Associated Builders & Contractors of Massachusetts v. Massachusetts Water Resources Auth.*, 935 F.2d 345, 347-348 (1st Cir. 1991) ("*MWRA*"). By its terms, the Labor Agreement nullifies any preexisting collective bargaining agreement to which a contractor and his employees' representative may be signatory. In addition, the use of economic weaponry throughout negotiations for each of the five successor Labor Agreements is prohibited. Any disagreement over terms will be submitted to interest arbitration, with the final result dictated by an outside third party and imposed by the State through its bidding requirements. Not only must all construction workers be referred by a Union hiring hall, but those employees must become members of the Union, pay Union dues, and accept the Union as their sole and exclusive bargaining representative. *Id.* at 348.

The State's imposition of these terms and representational requirements on private parties both eviscerates statutorily protected rights and subverts the federally-protected bargaining process. It makes no difference whether that collective bargaining agreement, *if chosen by private parties*, would be lawful or unlawful. What is prohibited—indeed, all that is covered by the doctrine of preemption and the reach of the Supremacy Clause—is coercive *governmental* action. The question presented here is not whether the private parties have acted lawfully, but whether the State may intervene as it did in the employment relations of private individuals.

Petitioners' and *amicus* United States' suggestion that the Court should nonetheless carve out an exception to the general rules of preemption whenever a State makes "proprietary" decisions simply cannot be reconciled with either the language or spirit of the NLRA. Preemption does not turn on a State's particular reason for regulating the relations of private parties. And while the State's relationship with its own employees is expressly exempted from the Act, this is simply an ordinary manifestation of well-recognized principles of federalism,

which preclude direct federal regulation of the States and their internal activities. There is no principled basis upon which to suggest that where the State's interest can be characterized as proprietary, its regulatory authority implementing that interest is entitled to an exemption from federal preemption.

Amicus does not question the State's freedom to act in its proprietary interest. It may choose to purchase cheaper goods. It may insist upon reliability by, and impose reliability standards on, its suppliers. But the State may not dictate the labor relations of its suppliers. That is an arena exclusively reserved to the parties and controlled by the policies of federal labor law.

Finally, the fact that this case involves a type of collective bargaining agreement that is permissible under Sections 8(e) and (f) of the Act does not alter the analysis. There are a host of activities, bargaining relationships and labor relations strategies that are specifically or implicitly permissible under the NLRA when adopted by private parties. But in no instance has the Court held that a State may require a private employer to bargain or refuse to bargain with a union, notwithstanding the fact that a private employer could independently do either. In sum, the unique context of this case—and the seeming benefits of the Section 8(f) agreement which the State prefers and therefore has *required*—do not change the fact that federal labor policy precludes States from imposing any form of labor representation or agreement on parties covered by the NLRA.

ARGUMENT

I. THE NLRA PREEMPTS THE STATE'S EFFORT TO IMPOSE ITS VIEW OF ACCEPTABLE LABOR RELATIONSHIPS AND TERMS AND CONDITIONS OF EMPLOYMENT ON PRIVATE PARTIES.

It is common ground that the National Labor Relations Act sets forth a comprehensive regulatory scheme under which labor relations are to be monitored and conducted. It is also well established that this federal scheme was intended to displace all forms of state interference with the policies and principles expressed by the Act. The Court has delineated two rules of NLRA preemption, both of which are implicated by the extraordinarily intrusive and comprehensive mechanism through which the State here attempts to dictate all aspects of labor relations at the Boston Harbor site. The *Machinists* rule "precludes state and municipal regulation 'concerning conduct that Congress intended to be unregulated.'" *Golden State I*, 475 U.S. at 614 (discussing *Machinists*, 427 U.S. 132). The second strand of preemption, the so-called *Garmon* rule, "is intended to preclude State interference with the National Labor Relations Board's interpretation and active enforcement of the 'integrated scheme of regulation' established by the NLRA." *Golden State I*, 475 U.S. at 613 (citing *Garmon*, 359 U.S. 236 (1959)). To that end, it prohibits States from regulating activity that the NLRA protects, prohibits, or arguably protects or prohibits.

A. The NLRA Preempts State Interference With The Collective Bargaining Process.

"'Free collective bargaining is the cornerstone of the structure of labor-management relations carefully designed by Congress when it enacted the NLRA.'" *Golden State I*, 475 U.S. at 619 (quoting *New York Tel. Co. v. New York State Dep't. of Labor*, 440 U.S. 519, 551 (1979) (Powell J., dissenting)). Grounded in the premise of "freedom of contract," (*H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970)), the "'essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.'" *Id.* at 104 (quoting S. Rep. No. 573, 74th Cong., 1st Sess. 12 (1935)). The terms and conditions of employment are to be established by the parties themselves through the bargaining process, armed with the economic weaponry allowed under the Act and subject to the duties which the Act imposes.

The "fundamental premise" underlying the Act is that there should be "private bargaining under governmental supervision of the procedure alone, *without any official compulsion over the actual terms of the contract.*" *H.K. Porter*, 397 U.S. at 108.[9] *See also Golden State I*, 475 U.S. at 619 ("[e]ven though agreement is sometimes impossible, government may not step in and become a party to the negotiations"); *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 490 (1960) ("[o]ur labor policy is not presently erected on a foundation of government control of the results of negotiations"); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937) ("[t]he theory of the Act is that free opportunity for negotiation . . . may bring about the adjustments and agreements which the Act in itself does not attempt to compel"). As this Court admonished over three decades ago, States have no role to play in this federally-protected bargaining process:

> [T]here is no room in this scheme for the application here of . . . state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions. Since the federal law operates here, in an area *where its authority is paramount, . . . the inconsistent application of state law is necessarily outside the power of the State.*

Local 24, Int'l Bhd. of Teamsters v. Oliver, 358 U.S. 283, 296 (1959) (citation omitted).

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[9] Underscoring in quoted passages throughout this brief is added unless otherwise indicated.

In short, federal labor law requires state and local government neutrality in connection with private labor relations. Only "neutral" state laws which are "not directed toward altering the bargaining positions of employers or unions," (*Machinists*, 427 U.S. at 156 (Powell J., concurring)), *and* which are "unrelated *in any way* to the process of bargaining or self-organization" are permitted. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985). "State laws should not be regarded as neutral if they reflect an accommodation of the special interests of employers, unions, *or the public* in areas such as employee self-organization, labor disputes, or collective bargaining." *Machinists*, 427 U.S. at 156, n.* (Powell J., concurring). Put simply, States may neither "encourage nor discourage the collective bargaining processes which are the subject of the NLRA," (*Metropolitan Life*, 471 U.S. at 755) or take actions that are "inconsistent with the general legislative goals of the NLRA" to foster employee free choice and free collective bargaining. *Id.* at 757. *Accord Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987).[10]

Specification 13.1., by which the State seeks to impose collective bargaining terms on unknown private employees and employers at the Boston Harbor site for the next ten years, conflicts with these most fundamental tenets of the NLRA. Indeed, "[f]or all intents and purposes the state here *eliminates* the bargaining process altogether." *MWRA*, 935 F.2d at 353 (emphasis in original). Through its bidding Specification, the State has transformed a particular collective bargaining agreement negotiated by its

[10] In *Metropolitan Life* and *Fort Halifax* the Court focused on the *effect* of state regulation on the collective bargaining processes established by the NLRA. *Fort Halifax*, 482 U.S. at 20; *Metropolitan Life*, 471 U.S. at 758. The modest supplements to the terms and conditions of employment at issue in those cases escaped preemption only because they were laws of general applicability that "neither encourage[d] nor discourage[d]" this federal process. *Metropolitan Life*, 471 U.S. at 755.

agent [11] into a state regulation with the force and effect of state law. Moreover, it has for the future replaced the collective bargaining process with state-mandated "interest arbitration" to establish the terms and conditions of employment.

The effect of Specification 13.1 on NLRA-protected rights is clear and unambiguous.[12] *No* contractor may obtain work at the Boston Harbor project unless and until, "as a condition of being awarded a contract or subcontract", he or she agrees "to abide by the provisions of the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement." *MWRA*, 935 F.2d at 347-48. By its terms, the Labor Agreement nullifies any preexisting collective bargaining agreement to which a contractor and his employees' representative may be signatory. *Id.* Five successor Labor Agreements are contemplated during the term of the Boston Harbor project. Jt. App. at 41. The use of economic weaponry during these negotiations will not be permitted; rather, any disagreement over terms will be submitted to interest arbitration, with the final result dictated by an outside third party and imposed by the State through its bidding requirements. *MWRA*, 935 F.2d at 348. Not only must all construction workers be referred by the Union hiring hall, but those employees must become members of the Union, pay Union dues, and accept the Union as their sole and exclusive bargaining representative. *Id.*

[11] *See* Memorandum to James F. Snow, Jt. App. at 92-93.

[12] The fact that the State has acted through a bidding specification rather than through a law of general application is irrelevant. First, Petitioners' argument that the State as purchaser is free to meddle into collective bargaining (and representational issues) admits no limitations—either to the Boston Harbor project or to construction contracts generally. Second, " 'judicial concern has necessarily focused on the nature of the activities which States have sought to regulate, rather than on the method of regulation adopted.' " *Golden State I*, 475 U.S. at 614 n.5 (citations omitted).

Through these and other terms, imposed for the entire 10-year duration of the Boston Harbor cleanup, the State has asserted the right to: (1) impose a complete collective bargaining agreement, in derogation of any pre-existing contracts; (2) impose an exclusive representative on private employees who might be otherwise represented or have chosen not to be represented by a union; (3) require membership in a union not of the employees' own choosing; and (4) limit future bargaining through the imposition of interest arbitration. Its actions clearly interfere with the federally protected bargaining process and are preempted.

B. *Garmon* Preempts The State's Attempt To Impose A Collective Bargaining Representative Onto Private Employees.

Federal labor policy preempts state action whenever that action would interfere with the "primary jurisdiction" of the National Labor Relations Board. *Garmon*, 359 U.S. at 245. Concerns for state autonomy—of the kind argued by Petitioners and the United States in this case—had led to numerous decisions in which the Court "grappl[ed] with [the] pre-emption problem" of where to draw the line between state and federal jurisdiction over labor issues. *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 290 (1971). Ultimately, years of "experience—not pure logic" mandated the clear primacy of federal law. *Id.* at 291. In 1959, the Court articulated the now-familiar *Garmon* test:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, *due regard for the federal enactment requires that state jurisdiction must yield.* To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.

Garmon, 359 U.S. at 244. The selection of a collective bargaining representative—and the decision to refrain from collective activities—are explicitly protected by Section 7 of the Act.[13] Interference with these employee rights by either employers or unions constitutes an unfair labor practice.[14] *Garmon* precludes state interference with these rights and obligations.

The Labor Agreement enforced through Specification 13.1 imposes the signatory Union as the sole and exclusive collective bargaining representative of all construction workers who now—or who may in the future—work on the Boston Harbor project. *MWRA*, 935 F.2d at 348.[15]

[13] 29 U.S.C. § 157 (1988).

[14] *See* Sections 8(a)(1) and 8(a)(2), 29 U.S.C. §§ 158(a)(1) and (2), and Section 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A).

[15] The United States concedes that no State could impose pre-hire recognition "as a condition of obtaining a state contract outside the construction industry" because it would violate employee rights under Section 7 of the Act. U.S. Br. 20 n.14. The Government argues that the State's action is permissible here because it is "confined to a single construction project" and because the employees themselves could later reject representation under the last proviso to Section 8(f). *Id.* The issue is not, however, whether this particular representation would or would not be lawful under the Act. The decisive inquiry under *Garmon* is whether this question of representation falls within the exclusive jurisdiction of the NLRB. It plainly does.

The unbridled scope of Petitioners' argument that States as market participants are not bound by the NLRA and are free to act in "matters affecting labor relations" raises the question whether the State would, in fact, consider itself limited by the last proviso in Section 8(f). Pet. Br. 19. Similarly unclear is whether the State would acknowledge the primacy of the Court's decisions in *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), or *Communications Workers v. Beck*, 487 U.S. 735 (1988). These decisions limit imposed union "membership" to its "financial core" (*General Motors*, 373 U.S. at 742) and to specific representational matters (*Beck*, 487 U.S. at 762-63). Petitioners do not explain the inherent inconsistency between their basic argument that States as "market participants" are not constrained by the NLRA and

Under that agreement, each and every construction worker must be referred by the Union hiring hall, become a member of the Union, pay dues to the Union, and accept the Union as a sole and exclusive bargaining representative. *Id.* For their part, employers must accept the agreement negotiated under state auspices just as if they had freely recognized and negotiated with the Union themselves.

Petitioners purport not to understand the First Circuit's suggestion that the imposition of a collective bargaining representative would "'implicat[e]' the *Garmon* preemption principle." Pet. Br. 22-23 n.13. Their confusion is inexplicable. The court below quite clearly and accurately noted that Specification 13.1 "establishes recognition of the Trades Council . . . as the condition of the award of an MWRA bid." *MWRA*, 935 F.2d at 357. Thus, through the vehicle of its bidding requirements, the State has imposed a collective bargaining representative in derogation of protected employee rights under Section 7 of the Act. 29 U.S.C. § 157 (1988). This state "regulation of matters protected by § 7 of the Act" (*id.* at 355), falls squarely within the *Garmon* preemption rule. *Garmon*, 359 U.S. at 244 (neither federal nor state government can regulate activities "which . . . are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8").

Garmon does permit state action on matters which are "peripheral" to NLRA concerns. *Garmon*, 359 U.S. at 243. Assuredly, however, the exercise of Section 7 rights and the selection of a bargaining representative are "plainly within the central aim of federal regulation" and not peripheral in any way. *Id.* at 244. *Garmon* also permits States to act when the regulated conduct affects "interests so deeply rooted in local feeling and responsibility" that Congress did not intend preemption to apply. *Id.* Petitioners make no claim that Massachusetts has a

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acknowledgment that *some* aspects of federal labor law would nonetheless apply.

"deeply rooted" interest in the identity of the bargaining representative of workers it cannot presently identify for contracts it has not yet let.[16] Since Section 7 of the Act specifically protects the exercise of employee rights "to bargain collectively through representatives of their own choosing . . . and . . . to refrain" therefrom, and imposes sanctions for violation of these rights, the federal interest entirely supplants whatever showing Massachusetts might hope to advance.

II. THE COURT SHOULD NOT IMPORT A "MARKET PARTICIPANT" DOCTRINE INTO FEDERAL LABOR LAW.

Petitioners' and the United States' argument that a single construction project is all that is at stake here is disingenuous. Nothing in the Petitioners' "market participant" theory limits its application to "a single construction project" (U.S. Br. 20) or, realistically, to construction contracts at all.[17] *If* Massachusetts is freed by "principles of federalism" [18] from attention to federal

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[16] The State's interest is in timely completion of the project. While that interest may be important, it does not excuse the *means* adopted by the State to ensure that result. *MWRA*, 935 F.2d at 359 ("[i]t is not the clean-up, however, which is being regulated; collective bargaining is being regulated, and that cannot be").

[17] While the United States' primary argument appears to be that the construction context of the state activity involved here privileges imposition of a contract and bargaining representative, it also argues more broadly that "[p]rinciples of federalism counsel that an Act of Congress should not be construed to single out state and local governments for special regulatory burdens when they act in a proprietary capacity (and in a manner that is fully consistent with federal law), absent an explicit statement of congressional intent to that effect." U.S. Br. 14. This argument begs the question. The issue is whether the State can, "in a manner that is fully consistent with federal law," impose collective bargaining terms and representatives on private employees and employers as a cost of doing business with the State.

[18] U.S. Br. 14; Pet. Br. 36.

law when it spends public monies, those principles and that freedom must apply equally to other purchases and other laws as well. Petitioners simply seek to excuse *any* state action that interferes with collective bargaining and representational rights under the NLRA *whenever* the State can assert that it is taking such action because of its interest as the purchaser of goods or services.[19] The First Circuit quite correctly described the breadth of Petitioners' argument:

> If the state employer exclusion from the NLRA were interpreted to include all situations in which a state contracted for goods or services, the exception would likely swallow the rule. Allowing a state to impose restrictions upon *all* companies from which it purchases goods or services would effectively permit it to regulate labor relations between private employers and their employees thus totally displacing the NLRA . . . .

MWRA, 935 F.2d at 355 (emphasis in original). In all of these contexts, a state's determination of the labor

[19] Pet. Br. 18 ("when states act in a purely proprietary capacity for purely proprietary reasons in the same manner as a private proprietor[,] the states are [not] foreclosed from action that directly affects collective bargaining by others"); at 19 ("the NLRA embodies an intent that, when the states act as persons engaged in proprietary conduct for proprietary reasons, they should have, if anything, more freedom than private parties in matters affecting labor relations, not less"); at 21 (NLRA does not "impose a limitation on a state's management of its own property when the state pursues its purely proprietary interests, and where analogous private conduct would be permitted"); at 27 (omission of states from the NLRA statutory definition of an employer "strongly suggests that state proprietary actions . . . do not run afoul of the Act").

It should be noted that the United States, as *amicus*, does not support the full breadth of Petitioners' argument: "We do not contend, of course, that a State's actions are *automatically* insulated from preemption under the NLRA whenever it acts as a purchaser of services or other market participant." U.S. Br. 19 n.14.

relations relationship that best serves state interests would wholly eviscerate private parties' federally protected rights to make those decisions themselves.

A. Labor Preemption Does Not Distinguish "Regulatory" And "Proprietary" State Actions.

The "bright line" that Petitioners attempt to draw between regulatory and proprietary actions does not, in fact, exist. State action by its very nature—whether by legislation, formal rules, or the exercise of its purchasing power—has a coercive effect on individuals and businesses that no private party could obtain. Regardless of its form, state action must be evaluated under the same standards of preemption that apply whenever the State might "frustrate the federal scheme." *Metropolitan Life*, 471 U.S. at 747.

Thus, Petitioners' argument is not only directly contrary to every labor preemption decision of the Court, but it ignores the regulatory scheme by which the State can "enforce" its "purchasing" decisions against private parties. Specification 13.1 has the power and force of the Commonwealth of Massachusetts behind it. Indeed, Massachusetts law would debar any contractor who failed to comply fully with the Specification from future state contracts. Mass. Gen. Laws Ann., ch. 29, §§ 29F(2)(iii) (West 1982 and Supp. 1992) (debarment proper for "a record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more public contracts").[20] Through its bidding requirements, therefore, the State has not only dictated that a specific

[20] Debarment is defined by state law as "exclusion from public contracting or subcontracting for a reasonable, specified period of time commensurate with the seriousness of the offense." Mass. Gen. Laws Ann., ch. 29, § 29F(a). For the length of a debarment, "public contracts shall not be awarded and . . . offers, bids, or proposals shall not be solocited." Mass. Gen. Laws Ann., ch. 29, § 29F(b). Specification 13.1 applies "'in the same manner as any other provision of the contract.'" *MWRA*, 935 F.2d at 348.

collective bargaining agreement be adopted, that specific union representation be accepted by employees and recognized by employers, and that pre-negotiated terms and conditions apply; it has also given those dictates the force and effect of state law with its own peculiar and far-reaching remedies for breach.

Petitioners attempt to rewrite the Court's decisions by perceiving a heretofore unknown "intent" embodied in the NLRA to give States "more freedom than private parties", to "directly affect[] collective bargaining *by others*," whenever the State makes a purchasing decision. Pet. Br. 18-19. There is no such intent. The States have broad authority over their own labor relations but the States were left with no power to impose their will on the labor relations of "others," by which *amicus* understands Petitioners to mean private employers and their employees. It is not at all surprising that the Act bars the State from exercising coercive power to impose its will on private citizens, while allowing those citizens themselves to use whatever economic power is at their disposal against other private citizens. Government is treated differently under preemption analysis, just as it is with respect to any number of other constitutional requirements. This Court has emphasized that "[t]he Act treats state action differently from private action not merely because they frequently take different forms, but also because in our system States simply are different from private parties and have a different role to play." *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 290 (1986).

> [G]overnment occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints. Outside the area of Commerce Clause jurisprudence, it is far from unusual for federal law to prohibit States from making spending decisions in ways that are permissible for private parties.

Id.

In short, it is irrelevant that a private construction contractor, operating under the terms of the NLRA, may lawfully sign a pre-hire collective bargaining agreement. Congress simply did not "intend[] to allow States to interfere with the 'interrelated federal scheme of law, remedy, and administration under the NLRA as long as they did so through the exercises of the spending power." *Id.* (citation omitted).[21]

Government is indeed different and it is not surprising that it is treated that way. Voters elect local and state representatives according to the voters' interests and priorities. Once in office, every elected official attends carefully to the views expressed by constituents. Public democracy is expected to work in this manner. Just so, the NLRA was established to create a system of industrial democracy which would be responsive to the interests and views of the employees in each bargaining unit and under which terms and conditions would be established by market forces, not government edict.

B. Petitioners' "Market Participant" Theory Would Allow A System Of Labor Relations By Political Edict.

A decision for Petitioners would open the doors to the politicization of private labor relations—precisely the evil Congress sought to avoid when it prescribed a regime of (1) employee self-determination and (2) wages, hours and conditions of employment governed by the market. If decisions about who should represent employees and on what terms they should work can be set by the State, it

[21] The United States as *amicus curiae* argues that *Gould* is inapplicable because *Gould* involved *Garmon* preemption and this case involves *Machinists* preemption. U.S. Br. 20 n.15. The simplicity of the analysis is attractive but it overlooks the fact that the Court relied on *Gould* in deciding *Golden State I* (475 U.S. at 618), in the context of a *Machinists* preemption analysis. *Id.* at 618 n.8. As the court below correctly concluded, "both forms of preemption are implicated." *MWRA*, 935 F.2d at 352.

is inevitable that representatives of labor and management will seek to persuade government officials to exercise their power to set those terms in favor of one side or the other. Such a result is a predictable part of our political process. The Court has seen how constituent pressures affect the actions of local politicians (*Golden State I*, 475 U.S. at 611), and the Court has consistently sought to insulate private employment relationships from such political pressures. It has stated unequivocally that the NLRA, not state law or politics, "comprehensively deals with labor-management relations from the inception of organizational activity through the negotiation of a collective-bargaining agreement." *English v. General Electric Co.*, 110 S.Ct. 2270, 2279 n.8 (1990).

The loudest voices or biggest donors to a public official's campaign cannot, of course, be relied upon to determine the bargaining representative and set terms and conditions of employment for private employees without subverting the workplace democracy constructed by Congress. Indeed, even honest political debate in city council chambers or state legislatures cannot supersede the principles of representational democracy and economic warfare contemplated under the Act. Congress determined that the States were incapable of protecting employee rights and, on that basis, enacted the NLRA. *Id.* at 2279 n.8 (the impetus for passage of the NLRA was "Congress' perception that the NLRA was needed because state legislatures and courts were unable to provide an informed and coherent labor policy") (citing *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 286 (1971)).

A State unquestionably has a legitimate interest in the effective and efficient completion of public works. And it is not helpless to protect that legitimate interest. Here, for example, the thrust of the state's concern lies in the timetable which was imposed for completion of the Boston Harbor project because of previous inattention to environmental standards. Pet. Br. 3-4, 6. Given that concern, the State could require potential contractors to

submit a plan for the avoidance of interruptions to the project schedule, and determine who would be awarded bids according to the assurances received.[22] The State could also require adequate bonds or other commitments to ensure that the job is completed on time. It could require detailed submissions to ensure that a contractor had adequate numbers of workers with adequate skills to perform to the state's satisfaction.

What the State cannot do is to specify how "matters affecting labor relations" are to be resolved. Pet. Br. 19. When a State affirmatively takes steps that dictate a particular labor relations climate or result—whether "pro-union" or "anti-union"—the federal interest in collective bargaining free from "official compulsion" is defeated. *H.K. Porter*, 397 U.S. at 108.

Just as critically, a State must remain absolutely neutral on representational issues. Whatever the state's interest may be in the cost components of a collective bargaining agreement or in the avoidance of disruptions and strikes, it can advance *no* legitimate interest to justify imposition of a particular exclusive bargaining representative on employees. Such an intrusion into federally-protected rights bears no relationship to the performance of contractual obligations in the sale of goods or services to a State.

Taken to its obvious conclusion, Petitioners' argument would allow a State, in its guise as proprietary market participant, to supplant the NLRB election process and the free negotiation of collective bargaining agreements. For instance, a State could:

- Refuse to do business with any employer that is not signatory to a union contract; or

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[22] Thus, the Court has previously noted that it did "not say that state purchasing decisions may never be *influenced by* labor considerations." *Gould*, 475 U.S. at 291. However, to be "influenced by" labor considerations is a far different matter than to affirmatively exert state regulation onto labor relations matters.

- Refuse to do business with any employer whose employees are represented by a union, in order to avoid any interruption to state interests if contract negotiations resulted in a strike; or
- Refuse to contract with any employer whose employees did not agree to waive their right to renegotiate their collective bargaining agreement, or the right to strike, for the duration of the public work; or
- Set employment terms that meet the state's image of what is "best" and deny state contracts to any employer who does not insist upon identical terms in collective bargaining negotiations and refuse demands for any different combination of wages and benefits; or
- Require the abrogation of collective bargaining agreements that do not meet state standards, as a cost of doing business with the State; or
- Identify "preferred" unions and award state work to employers so organized.

In sum, a "market participant" exception to NLRA preemption, into which Petitioners would insert the Boston Harbor Labor Agreement, promises to confuse still more the difficult area of federal labor preemption "without yielding anything in return by way of predictability or ease of judicial application." *Lockridge*, 403 U.S. at 291. If a State, through the simple expedient of invoking its purchasing power, can require private parties to come to terms on bargaining representatives and a collective bargaining agreement—or lose state business altogether—"it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract." *Insurance Agents*, 361 U.S. at 490. The realities of the pressures on contractors in Boston are similar in kind, but greater in degree, than those that were impermissibly imposed on Golden State Transit Company. *See Golden State I*, 475 U.S. at 611. This state action directly implicates individual employee rights under Section 7 and is plainly contrary to the teachings of *Garmon*. Expanded state power to regulate private labor relations through its purchasing decisions should be rejected by the Court as both unwise and unworkable.

III. THE FACT THAT THE STATE IS EXEMPT FROM DIRECT REGULATION UNDER THE ACT NEITHER ALTERS NOR AFFECTS THE PREEMPTION ANALYSIS.

Our system of federalism confers delegated powers on the national government but preserves state autonomy in several important respects. Pursuant to its power "[t]o regulate Commerce . . . among the several States", U.S. Const., Art. I, § 8, cl. 3, Congress passed the National Labor Relations Act and assumed federal control of labor relations issues. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). However, out of careful respect for state sovereignty, Congress did not impose the strictures of the NLRA on state governments. Instead, the federal government acts "'with ample power, *directly upon the citizens*'" and not upon or through the States. *New York v. United States*, 112 S.Ct. at 2421 (citation omitted) (emphasis in original). Consistent with the sensitivities inherent in mutual sovereignty, Congress did not attempt to impose the obligations of the NLRA on the States but, rather, explicitly removed the States from its coverage.

Without doubt, state and local governments are exempt from coverage by the NLRA. Petitioners argue that this exemption frees every State from any obligation to avoid intrusion into the rights and obligations of private parties, who are so covered. Pet. Br. 27. Petitioners have misconstrued the import of congressional silence and in doing so have inverted the logic of the statute.

Congressional regard for state autonomy extends to its intentional exclusion of the States from the scope of the Act. States, as employers, are freed from the obligations of the statute and ineligible to claim its benefits. It was unnecessary for the Act to "expressly prohibit" a State

from "engaging in any particular transaction" (Pet. Br. 27); the Supremacy Clause[23] prohibits state interference with the complex scheme devised by Congress. The very silence of the Act, which Petitioners tout, demonstrates the force of Congress' intention that States refrain altogether from interfering with federally protected rights.

Congress has occupied the field of private labor relations. No lesser government can interfere. Any state action which attempts to stake out a position on that field is improper and preempted.

IV. THE PRIVILEGES CONFERRED BY SECTION 8(f) DO NOT AFFECT THE PREEMPTION ANALYSIS.

The preemption question is similarly not affected by the fact that Sections 8(e) and 8(f) of the Act permit private parties voluntarily to enter into pre-hire agreements akin to the Labor Agreement enforced by the State here. The issue is whether it is lawful for state or local governments to require that they do so.

It is clear that the determinative preemption question cannot be whether the subject on which the State seeks to intervene *involves* Sections 8(e) and (f) of the Act. Petitioners do not even contend that this is an area in which the States are free to regulate at will. If that were the case, then the State would be free to prohibit construction contractors and unions from adopting such agreements.

The fact that proper Section 8(e) and 8(f) agreements are lawful if private parties freely agree upon them only serves to emphasize that state imposition of a pre-hire contract and bargaining representative cannot be permitted. One might hypothesize that a State required

[23] "[T]he Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2.

adherence to an agreement which turned out *not* to be lawful under the Act because it was too broad in its scope (or for any other reason). The private parties to such an unlawful agreement presumptively would be subject to unfair labor practice charges and the jurisdiction of the Board. Would the fact that the State had mandated the practice somehow immunize the private parties from penalties because their conduct was not volitional, but imposed by the State? Or, in the alternative, should the State be joined as a party in the unfair labor practice proceedings? Either result would force the Board directly to regulate the State or to allow patently illegal conduct to continue.

Such an intrusion into state sovereignty through direct regulation would exacerbate federal-state conflict. Plainly, it would be antithetical to the clear division of state and federal authority delineated in this Court's cases and implicit in the Act. The line drawn by the Court has never been either situation- or motive-based. Congress provided no role for state government in the regulation of private labor relations which are under the jurisdiction of the NLRB; the Court ought not to allow incursions upon that rule. The broad, clear and well established principle that the States have no authority to prescribe the labor relations of private parties has long served to insulate the system of private labor relations from political pressure. It is also the only means to effectively prevent entanglement and direct confrontation between federal and state government.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

Of Counsel:
STEPHEN A. BOKAT
ROBIN S. CONRAD
MONA C. ZEIBERG
NATIONAL CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

ROSEMARY M. COLLYER
CLIFTON S. ELGARTEN *
ELLEN B. MORAN
CROWELL & MORING
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595
(202) 624-2500
* *Counsel of Record for Amicus Curiae*

September 8, 1992